

HONG KONG / JUDGMENT

RE TONG CHI KEUNG, TOM

COURT

Court of First Instance

DECIDED

4 July 2007

CASE / FILE NUMBER

HCB2960/2006

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bjbj lace), a Creditor

Before: Hon Kwan J in Court Date of Hearing: 4 July 2007 Date of Judgment: 4 July 2007

J U D G M E N T

This bankruptcy petition against Tong Chi Keung Tom was presented by Desert Palace Inc doing business as Caesars Palace of Las Vegas, in the state of Nevada, of the United States. The petitioner will be referred to in this judgment as the petitioner or Caesars Palace. The amended petition is based on the debtor's failure to comply with a statutory demand for US\$300,000.00, equivalent to HK\$2,328,000.00. The statutory demand dated 7 March 2006 was served on the debtor personally on 11 March 2006. The debt demanded was the balance of monies lent by the petitioner to the debtor for the purpose of lawful gaming at the petitioner's casino in Las Vegas. The subject debt was incurred in February 2003. The debtor is not legally represented in these proceedings. His affirmations have not been numbered properly. I have counted a total of 6 affirmations made by the debtor in opposition. He denies that he is indebted to the petitioner for a number of reasons, which I will consider. The petitioner has filed affidavits from its associate general counsel Vernon A Nelson Junior, its agent co-ordinator Anne Marie Flynn, its director of collections Roy J Jones Senior, and its marketing manager in Hong Kong Ho Siu Lun Aaron. As the debtor has informed this court on 31 October 2006 that he does not wish to cross-examine Mr Nelson, Miss Flynn, and Mr Jones, I gave leave to the petitioner to rely on the affidavits of these deponents without calling them. I gave directions that the debtor is to attend the trial of the petition for cross-examination, failing which his affirmations may not be relied upon. Subsequent to the directions given on 31 October 2006, the petitioner filed the 4th affidavit of Mr Nelson and an affirmation from an additional deponent, Mr Ho. At the start of the trial, the debtor informed the court he has no wish to cross-examine Mr Nelson on his 4th affidavit but would wish to cross-examine Mr Ho. I directed that the petitioner may not rely on Mr Ho's

affirmation without calling him. Mr Burns, SC then informed the court that the petitioner would not be relying on the affirmation of Mr Ho. The debtor was cross-examined by Mr Burns. Thus, I have had the opportunity of assessing the evidence of the debtor with the benefit of cross-examination. I will first set out the matters that are not disputed. The background Caesars Palace has been granted a gaming licence by Nevada State Gaming Control Board, which is regularly renewed. Gaming is made lawful by Chapter 463 of Nevada Statutes. Caesars Palace has the right under Nevada Revised Statute 463.368(1) to seek enforcement of credit instruments or the debts they represent and owed to it by patrons where these are evidenced in writing. If a patron at the Caesars Palace casino asks for credit, he will be required to complete a credit application. If the application is approved, he will be allocated an account number, and entered on the casino's computer system. After credit has been permitted, the patron may ask for a particular sum of money or chips to gamble. The casino will provide the money or chips upon the patron signing a counter cheque or marker. A marker is used in licensed casinos in Nevada in place of a personal cheque and is evidence in writing of a lawful and enforceable debt for the purpose of Nevada Revised Statute 463.368(1). The debtor had been a patron of the petitioner's casino since 1994. He had applied for and was given a substantial line of credit at the Caesars Palace casino. He was allocated an account number and entered on the casino's computer system. On the occasion he visited the casino during 6 to 13 February 2003, he drew on his line of credit and signed a number of markers, evidencing the money advanced by the petitioner to him in the form of gaming tokens representing money or money's worth. The debtor has raised a number of grounds disputing liability to pay the petitioning debt. Whether the debt is enforceable in Hong Kong In the first document filed by the debtor on 16 June 2006, he raised 3 grounds in opposition. Firstly, he denied the petitioning debt and put the petitioner to strict proof. Secondly, he claimed that the lending alleged by the petitioner is contrary to public policy in Hong Kong. Thirdly, he asserted that the agreement alleged by the petitioner for money lending is not enforceable in the Hong Kong courts. The 2nd and 3rd grounds may be disposed of quickly. Mr. Burns has referred the court to the decision of the Court of Appeal in *Wong Hon v. Sheraton Desert Inn Corp* (trading as Desert Inn Resort & Casino) [1995] 3 HKC 331, in which the Court of Appeal held that an action on the loan granted by the plaintiff casino to a patron for gambling in the form of chips, as evidenced by markers, was valid by the governing law of the transaction, being the law of Nevada, and hence the plaintiff could sue and recover in Hong Kong. Other reasons for disputing the petitioner's debt In subsequent affirmations filed by the debtor, he put forward other reasons why he says he does not owe the petitioner US\$300,000.00 as alleged or at all. These reasons may be summarised as follows:

- (1) The petitioner has failed to disclose that the debtor had, between 6 and 11 February 2003, made 8 deposits in the total sum of US\$319,000.00.
- (2) All along, the debtor had an agreement with the petitioner if he should spend 20 hours or more gambling in the petitioner's casino on a visit, he would have (a) a discount of 17% in his gambling loss; (b) 5 airfare ticket allowances at US\$4,500.00 each; and (c) free accommodation, food and beverage in the petitioner's hotel (the debtor's 2nd affirmation dated 23 August 2006, paragraph 4). This alleged discount rebate was subsequently put in

this way: if the debtor should incur gambling loss at below US\$250,000.00, he would be given a discount rebate of 12% of his losses and he would be entitled to a maximum of 5 airfare tickets each costing US\$4,500.00; for gambling losses over US\$250,000.00, he would get 17% discount rebate plus airfare allowance (the debtor's 3rd affirmation dated 8 November 2006, paragraph 2). According to this standing agreement, of the alleged indebtedness of US\$300,000.00, the debtor should have a 17% discount of his gambling loss being US\$51,000.00, and 5 airfare ticket allowances being US\$22,500.00, giving a total of US\$73,500.00.

- (3) In November 2002, the debtor had an agreement with Kwok Shui Cheung Kerwin (Kwok), a vice president of the petitioner, that in consideration of the debtor bringing in customers from Mainland China to gamble in the petitioner's casino, the debtor would be given a rebate of 17% of the gambling losses of the Mainland Chinese customers introduced by him, to be set off against the debtor's own gambling losses. In addition, if such customers should spend 20 hours or more gambling at the petitioner's casino, the debtor would have 5 airfare ticket allowances at US\$4,500.00 each. In February 2003, the debtor brought in 2 customers from Mainland China, Zhao Yong and his brother. They gambled at the petitioner's casino for more than 20 hours and the Zhao brothers lost US\$500,000.00 on this visit. Pursuant to the agreement, of the alleged indebtedness of US\$300,000.00, the debtor should have a 17% rebate being US\$85,000.00 for the gambling losses of the Zhao brothers, to be set off against his own losses, and 5 airfare ticket allowances being US\$22,500.00, giving a total of US\$107,500.00. I will consider each of the debtor's reasons in the order set out above. If the debtor's deposits had been taken into account It is not in dispute that the debtor did make 8 deposits totalling US\$319,000.00 during 6 to 11 February 2003. However, it is clear from the affidavit of Mr Jones that these deposits were applied in payment of the debtor's earlier debts. No issue was taken by the debtor regarding Mr Jones explanation in his subsequent affirmations. As pointed out by Mr Burns, in a subsequent affirmation of the debtor dated 8 November 2006, the debtor acknowledged that during the visit in February 2003, he had incurred gambling losses at US\$300,000.00. There is no substance in any allegation that the petitioner had not taken the US\$319,000.00 into account in arriving at the debtor's net gambling losses of US\$300,000.00 in February 2003. That being the case, even if the debtor's allegations on his standing discounts and additional rebates for bringing in Mainland Chinese customers were made out, the debtor is still indebted to the petitioner of US\$119,000.00 (US\$300,000.00 less US\$181,000.00). In his evidence in court, the debtor has acknowledged that he is indebted to the petitioner of US\$119,000.00. He has no valid ground for not repaying a debt of US\$119,000.00. Other than tendering a cheque of HK\$200,000.00 to the petitioner in August 2004, which was rejected by the petitioner, the debtor has made no proposal to pay the amount of US\$119,000.00 which is indisputably due. There is no indication from the debtor he is able or is prepared to pay US\$119,000.00, no evidence from him of any reasonable prospect that he might be able to discharge that part of the petitioning debt which he has acknowledged. The undisputed balance is above the bankruptcy level of HK\$10,000.00 for the service of a statutory demand. On this ground

alone, a bankruptcy order should be made against the debtor, even if there were a genuine dispute for the balance of US\$181,000.00. If the debtor was entitled to discounts on the alleged standing arrangements The petitioner has denied there was any alleged standing arrangement. According to the 3rd affidavit of Mr Nelson, if a patron has incurred loss, when he departed the casino, Caesars Palace would usually enter into a further agreement with the patron called a discount or settlement agreement . This recorded that the patron would be given a discount equivalent to a specified proportion of his losses and a travel discount. The settlement agreement is strictly subject to the condition precedent of actual payment. In the present case, as the debtor did not pay, he was not entitled to any discount or a travel discount. Mr. Jones said in his affidavit that when the debtor left Caesars Palace on 13 February 2003, he agreed to make immediate payment of the balance of the monies lent to him and purported to do so by a cheque drawn on his company Evernew Consultants Limited. In consideration of that, Caesars Palace agreed that if his cheque was honoured upon first presentation, the debtor would be entitled to US\$17,000.00 airfare allowance, plus a discount of US\$28,700.00 on the balance due of the monies lent to him, so the amount due would be reduced from US\$300,000.00 to US\$254,300.00. The debtor drew a cheque in favour of the parent company of the petitioner of HK\$1,973,368.00, equivalent to US\$254,300.00. This cheque was returned unpaid on 26 April 2004, so the offered discounts were cancelled. The petitioner produced a memorandum under cover of which the debtor s company cheque was returned to show the discounts that the debtor would have been given and that the cheque was in settlement of the debt of US\$300,000.00. The discounts given by the petitioner bore no resemblance to the discounts alleged by the debtor. The debtor s allegation in one of his affirmations that his company cheque was given not in settlement of his debt but was drawn as guaranteed money to enable the Zhao brothers to gamble at the casino on a subsequent visit planned in May 2004 is wholly incredible. As submitted by Mr Burns, there was no good reason for the petitioner to require guaranteed money from the debtor on the alleged subsequent visit, as, according to the debtor, he was allegedly entitled to a credit line of US\$500,000.00, and the Zhao brothers had told him they would bring US\$500,000.00 cash on this visit. Besides, the notion that an odd figure of HK\$1,973,368.00 (equivalent to US\$254,300.00) was required as guaranteed money is plainly absurd. In the debtor s evidence in court, he backtracked from his affirmation. He claimed that the cheque of his company was provided for two purposes, as guaranteed money for the Zhao brothers to gamble in the petitioner s casino in May 2004, and in settlement of his own gambling losses in February 2003, which the petitioner had calculated at US\$254,300.00. He claimed however that the petitioner s calculation was disputed by him, and he agreed to provide the cheque on the basis that the petitioner s staff had promised they would not cash it. The alleged dual purpose was plainly an embellishment of his evidence. The allegation that the petitioner s staff sought a cheque from him which would not be presented for payment would make no sense at all. The debtor also gave contradictory evidence regarding his alleged arrangement with the petitioner that would give him entitlement to a discount on his own gambling losses. In his evidence in court, he claimed it was in November 2002 that Kwok had agreed with him if he was to introduce Mainland customers to the petitioner, he

would get a discount of not less than 17% of his own gambling losses and before that time his discount was not less than 12%. According to his 2nd affirmation, the agreement he had with the petitioner all along was that he would have 17% discount in his own gambling losses if he gambled for more than 20 hours. In his 3rd affirmation, he said all along, if his gambling losses were above US\$250,000.00, he would get 17% discount on his loss. I do not accept the debtor's evidence here. I reject his assertion he was entitled to discounts on his gambling losses, whether on the alleged standing arrangement or at all. If the debtor was entitled to additional rebates for bringing in customers The debtor made great play of the fact that the petitioner did not arrange for Kwok to make any affirmation. Kwok had left the petitioner's employment for some time. The petitioner adduced evidence from Mr Nelson, Ms Flynn and Mr Jones to this effect:

- (1) The debtor alleged he was offered terms if he brought in customers to Caesars Palace. Unless the debtor was appointed an independent agent pursuant to Nevada Revised Statute 463.368(25), it is not possible for Caesars Palace to make payment of any kind or allow any discounts, rebates, commission or airfares to the debtor of the nature he alleged. Extremely strict requirements were provided in regulation 25 for filing an application for registration. A very extensive procedure is required for an independent agent to be registered and Mr Nelson has produced to one of his affidavits an 11-page application form for registration, requiring disclosure of substantial information. The debtor is not and has never been a registered independent agent. There is no basis at law or in fact that the debtor was entitled to rebates of the kind as alleged.
- (2) The petitioner's staff had made searches of the petitioner's databases and found no trace of Zhao Yong or any one named Zhao with an address in China evidencing that they had played at Caesars Palace on a credit or cash basis at any time. Caesars Palace maintains detailed records concerning the visits of cash and credit players. Players who play, on a cash or credit basis, for US\$500,000.00 as alleged would be the subject of detailed records. A credit player would generate the kind of documents as had been generated for the debtor. A cash player for US\$500,000.00 would very quickly be noticed by the pit boss or floor man and would be carefully rated and very detailed records would be maintained. It would be extremely rare if not impossible for a cash player of that amount not to be rated.
- (3) Mr. Jones and his staff checked each and every available record of Caesars Palace. They were totally unable to find any trace whatsoever of any visit by Zhao Yong. They were only able to find hotel bills of the debtor for the stay at the Caesars Palace Hotel from 6 to 13 February 2003, which were produced. There is no reason to doubt the above evidence from the petitioner's witnesses. I reject the debtor's allegation there was any agreement between him and Kwok that he would receive additional rebates for bringing in customers from Mainland China. If the debtor had been entitled to such additional rebates, there is no credible explanation why he would draw a cheque of his company to pay the petitioner in the sum of HK\$1,973,368.00. Furthermore, the debtor had drawn his personal cheque of HK\$200,000.00 dated 15 August 2004 payable to Caesars Entertainment Inc. According to Mr Jones, in July

2004, the debtor made an offer to the Hong Kong office of Caesars Palace to discharge the balance due at the rate of HK\$200,000.00 per month by 10 payments, making a total repayment of US\$257,000.00, and sent his personal cheque for the 1st instalment. As the offer was not accepted, the cheque was not presented for payment. The debtor denied he had ever made an offer to settle his debt by instalments. He said his cheque of HK\$200,000.00 was given to the petitioner's staff to settle his losses in February 2003 and he had asked the petitioner to cash that cheque. He gave no credible explanation why the cheque was for the amount of HK\$200,000.00. I reject his evidence on this as well. I should mention that in the debtor's affirmation dated 13 July 2006, he alleged he had also agreed with Kwok that for credits and/or loans granted to Mainland customers brought in by him, the debtor would sign the marker or cheque for the Mainland customers for formality, and the petitioner would not demand payment of the same from him, but would chase for payment against the Mainland customers only. This allegation was not repeated in subsequent affirmations. I reject this as another instance of fabrication on his part. The debtor mentioned for the first time in his evidence in court that after he and the Zhao brothers had checked into the Caesars Palace Hotel, they went to stay at another hotel. When the Caesars Palace Hotel bills were shown to him and he was asked about the room service he ordered, he was driven to a somewhat ludicrous explanation that he had on occasions used his room in the Caesars Palace Hotel to rest. The debtor also said in his oral testimony for the first time that the losses of the Zhao brothers of US\$500,000.00 were included in his gambling losses in February 2003, making a total of US\$800,000.00. If this were true, there is no reason for such an important matter to have escaped his attention with no mention in any of his affirmations. Finally, the debtor was asked for an explanation why the Zhao brothers or any of those who allegedly accompanied him on his visit in February 2003 were not asked to provide an affirmation in these proceedings. The debtor's explanation was that it had not occurred to him to seek such an affirmation, and he did not think the evidence from the Zhao brothers would have made a material difference to his case. The debtor is quite simply not a credible witness. I find on the evidence there was no agreement by which the debtor was entitled to additional rebate for bringing in Mainland Chinese customers as alleged.

Orders

The debtor has failed to raise a bona fide dispute of the petitioning debt on substantial grounds. I make a bankruptcy order against him. The petitioner's costs in this petition, including the costs reserved on previous occasions, are to be paid out of the debtor's assets. (S Kwan) Judge of the Court of First Instance High Court Mr Ashley Burns SC, instructed by Messrs Hampton, Winter & Glynn, for the Petitioner The Debtor, acting in person PAGE - 1udk 1udk H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V i\$&`G hcb.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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